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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE DISTRICT OF OREGON

10 KIRSTEN CHRISTIAN,  
11 Plaintiff,

Civil No. 06-1673-AA  
OPINION AND ORDER

12 vs.

13 MICHAEL J. ASTRUE,  
14 Commissioner of Social Security,  
15 Defendant.

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AIKEN, Judge:

Claimant, Kirsten Christian, brings this action pursuant to  
the Social Security Act (the Act), 42 U.S.C. §§ 401-33, 405(g),

1 to obtain judicial review of a final decision of the Commissioner  
2 denying her application for disability insurance benefits under  
3 Title II of the Act. For the reasons set forth below, the  
4 Commissioner's decision is reversed and remanded for payment of  
5 benefits.

#### 6 PROCEDURAL BACKGROUND

7 Plaintiff protectively filed her application for Title II  
8 benefits on February 5, 2001. Tr. 79-81. Plaintiff alleged  
9 disability beginning March 10, 2000, due to a back injury and  
10 bipolar disorder. Tr. 85. Plaintiff's application was denied  
11 initially and on reconsideration. Tr. 61-69. On April 22,  
12 2002, plaintiff appeared with counsel for a hearing before a  
13 Administrative Law Judge (ALJ). Tr. 24-56. On September 20,  
14 2002, the ALJ issued a decision in which he held that plaintiff  
15 was not disabled. Tr. 10-22. On June 10, 2003, the United  
16 States District Court of the Eastern District of California  
17 remanded the case for further consideration. Tr. 319-339. On  
18 August 14, 2004, the Appeals Council remanded the case for a new  
19 hearing. Tr. 340.

20 On January 13, 2006, plaintiff, represented by an attorney,  
21 appeared and testified at a new hearing before ALJ Gary Elliott  
22 in Medford, Oregon. Tr. 465-487. On July 26, 2006, the ALJ  
23 issued a decision finding plaintiff not disabled within the  
24 meaning of the Act because she retained the capacity to make a  
25 vocational adjustment to other work existing in significant  
26 numbers in the national economy. Tr. 287-88. The ALJ's decision  
27 became the final decision of the Commissioner for purposes of  
28 judicial review. See 20 C.F.R. § 422.210.

1                                   **STATEMENT OF THE FACTS**

2           Plaintiff was 34 years old at the time of the ALJ hearing  
3 and completed a high school education. Tr. 84-92, 484.  
4 Plaintiff had past relevant work experience as a delicatessen  
5 clerk and grocery checker. Tr. 404. Plaintiff last worked in  
6 2000, but stopped working due to her pregnancy and subsequent  
7 maternity leave. Tr. 475.

8                                   **STANDARD OF REVIEW**

9           This court must affirm the Secretary's decision if it is  
10 based on proper legal standards and the findings are supported by  
11 substantial evidence in the record. Hammock v. Bowen, 879 F.2d  
12 498, 501 (9th Cir. 1989). Substantial evidence is "more than a  
13 mere scintilla. It means such relevant evidence as a reasonable  
14 mind might accept as adequate to support a conclusion."  
15 Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting  
16 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).  
17 The court must weigh "both the evidence that supports and  
18 detracts from the Secretary's conclusions." Martinez v. Heckler,  
19 807 F.2d 771, 772 (9th Cir. 1986).

20           The initial burden of proof rests upon the claimant to  
21 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486  
22 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate  
23 an "inability to engage in any substantial gainful activity by  
24 reason of any medically determinable physical or mental  
25 impairment which can be expected . . . to last for a continuous  
26 period of not less than 12 months. . . ." 42 U.S.C.  
27 § 423(d)(1)(A).

28           The Secretary has established a five-step sequential

1 process for determining whether a person is disabled. Bowen v.  
2 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,  
3 416.920. First the Secretary determines whether a claimant is  
4 engaged in "substantial gainful activity." If so, the claimant  
5 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.  
6 §§ 404.1520(b), 416.920(b).

7 In step two the Secretary determines whether the claimant  
8 has a "medically severe impairment or combination of  
9 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.  
10 §§ 404.1520(c), 416.920(c). If not, the claimant is not  
11 disabled.

12 In step three the Secretary determines whether the  
13 impairment meets or equals "one of a number of listed impairments  
14 that the Secretary acknowledges are so severe as to preclude  
15 substantial gainful activity." Id.; see 20 C.F.R.  
16 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively  
17 presumed disabled; if not, the Secretary proceeds to step four.  
18 Yuckert, 482 U.S. at 141.

19 In step four the Secretary determines whether the claimant  
20 can still perform "past relevant work." 20 C.F.R.  
21 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not  
22 disabled. If she cannot perform past relevant work, the burden  
23 shifts to the Secretary. In step five, the Secretary must  
24 establish that the claimant can perform other work. Yuckert, 482  
25 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &  
26 (f). If the Secretary meets this burden and proves that the  
27 claimant is able to perform other work which exists in the  
28 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,

1 416.966.

2 **DISCUSSION**

3 At step one of the five step sequential evaluation process  
4 outlined above, the ALJ found that plaintiff had not engaged in  
5 substantial gainful activity during the time period considered.  
6 Tr. 280, Finding 2. This finding is not in dispute. At step  
7 two, the ALJ found that plaintiff had the following severe  
8 combination of impairments: obesity, bipolar disorder, an anxiety  
9 disorder, and degenerative disc disease with a bulging disc at  
10 L4-5. Tr. 281, Finding 3. This finding is not in dispute. At  
11 step three, the ALJ found that plaintiff's impairments did not  
12 meet or equal the requirements of a listed impairment. Tr. 282,  
13 Finding 4. This finding is not in dispute.

14 The ALJ determined that plaintiff had the residual  
15 functional capacity (RFC) to perform work related activities at  
16 a reduced range of sedentary level of exertion. Tr. 282, Finding  
17 5. The ALJ limited plaintiff to lifting 10 pounds, both  
18 occasionally and frequently; standing/walking for 2 hours in an  
19 8-hour workday; sitting for about 6 hours in an 8-hour workday,  
20 with a sit/stand option that allowed her to change position every  
21 20 to 30 minutes. Id. Climbing, stooping, balancing, crouching,  
22 crawling, and kneeling were limited to an occasional basis. Id.  
23 The ALJ also limited plaintiff to simple, routine tasks and  
24 instruction, and found that direct contact with the public was  
25 precluded. Id. Finally, contact with co-workers was limited to  
26 an occasional basis. Id. These findings are in dispute.

27 At step four, the ALJ found that plaintiff was unable to  
28 return to her past relevant work. Tr. 287, Finding 6. This

1 finding is not in dispute. Finally, at step five, the ALJ found  
2 that, based on plaintiff's RFC and vocational testimony, she  
3 could make a vocational adjustment to perform other work existing  
4 in significant numbers in the national economy; specifically as  
5 an addresser, bench hand assembler, and assembler-optical. Tr.  
6 287-88. This finding is in dispute.

7 Residual Functional Capacity Finding

8 The ALJ concluded that plaintiff had severe impairments  
9 that were not disabling at step three. Therefore, the ALJ was  
10 required to assess plaintiff's RFC before proceeding to step  
11 four. Plaintiff's RFC is defined as the most she can do given  
12 her impairments and limitations. SSR 96-8p. In assessing  
13 plaintiff's RFC, the ALJ must consider the entire record and  
14 explain how he or she weighs the medical evidence and testimony.  
15 SSR 96-5p.

16 In the prior decision, the ALJ found plaintiff retained the  
17 capacity to perform a wide range of light work with occasional  
18 postural limitations. Tr. 18. In so finding, the ALJ discounted  
19 the opinion of treating physician, Kuldeep Sidhu, M.D., that  
20 plaintiff is unable to return to her occupation as a grocery  
21 store clerk and "should find a sedentary job." Tr. 170. The  
22 California District Court found the ALJ in the first hearing  
23 failed to provide specific and legitimate reasons for rejecting  
24 Dr. Sidhu's opinion. Tr. 323. The court noted, however, that it  
25 remained unclear whether plaintiff was disabled since Dr. Sidhu  
26 also opined that the only way plaintiff's back pain could be  
27 alleviated was through exercise. Tr. 323. To resolve the  
28 ambiguity, the district court directed the ALJ on remand to

1 solicit additional explanatory information from Dr. Sidhu and  
2 from a medical expert regarding plaintiff's physical limitations.  
3 Tr. 333.

4 Plaintiff argues that reversible error occurred since the  
5 ALJ failed, on remand, to comply with the district court's  
6 orders. Those orders were: to contact Dr. Sidhu, and obtain a  
7 medical expert. Plaintiff's Brief, p. 5-8. On remand, the ALJ  
8 gave controlling weight to Dr. Sidhu's opinion placing plaintiff  
9 in a sedentary exertional capacity rather than a light exertional  
10 capacity. Tr. 284. The defendant asserts that this removed the  
11 need specified by the district court to clarify Dr. Sidhu's  
12 testimony or obtain the services of a medical expert because the  
13 ALJ found that plaintiff did not have the capacity to do more  
14 than sedentary exertional activities. Tr. 323. I disagree. The  
15 California district court clearly credited Dr. Sidhu's opinion  
16 that plaintiff should be limited to sedentary work. Tr. 328.

17 The court held:

18 In this case, further development is necessary for  
19 a proper determination to be made. A redetermination  
20 of claimant's RFC should be performed on remand  
21 which takes into consideration Dr. Sidhu's credited  
22 opinion that claimant should be limited to sedentary  
23 work, and claimant's obesity and the effect it has,  
24 if any, on claimant's functioning. In addition, the  
25 ALJ shall fully and fairly develop the record by  
26 procuring additional explanatory information from  
27 Dr. Sidhu regarding his opinion that claimant can  
28 only perform a sedentary job and by eliciting the  
services of a medical expert to give testimony  
at a new administrative hearing regarding claimant's  
physical limitations.

Tr. 338-39

The court, in recognizing that Dr. Sidhu's opinion required  
further clarification, ordered as follows:

1 The undersigned agrees that Dr. Sidhu's opinion that  
2 claimant should find a sedentary job is uncertain and  
3 unexplained. Dr. Sidhu's opinions have been credited'  
4 in this matter, accordingly, on remand the ALJ must  
5 necessarily resolve this ambiguity. This may be  
6 accomplished, on remand, by the ALJ sending a medical  
7 questionnaire or a set of interrogatories to Dr.  
8 Sidhu or by requesting claimant's attorney to obtain  
9 additional records or information from Dr. Sidhu. The  
10 ALJ must fully develop the record on remand by  
11 supplementing the record with additional explanatory  
12 information from Dr. Sidhu prior to making a  
13 disability determination in this case.

14 Tr. 329(emphasis added).

15 The district court clearly credited Dr. Sidhu's opinion and  
16 ordered the ALJ to obtain further clarifying information from Dr.  
17 Sidhu. The defendant's assertion that the ALJ gave "controlling  
18 weight to Dr. Sidhu's opinion" obviated the need for clarifying  
19 testimony from Dr. Sidhu or a medical expert is misplaced. In  
20 fact, after expressly crediting Dr. Sidhu's opinion, the district  
21 court separately ordered the ALJ to "elicit the services of a  
22 medical expert to assist in properly assessing plaintiff's  
23 physical limitations." Tr. 329. The ALJ did neither. The  
24 defendant seems to acknowledge that the ALJ failed to comply with  
25 the district court's order, but asserts that failure is not  
26 reversible error because the ALJ's "finding that plaintiff was  
27 limited to a sedentary exertion was not inconsistent with the  
28 district court's remand order." Defendant's Brief, p. 7.

29 I disagree and find that the ALJ's noncompliance with the  
30 district court's clear order to "elicit the services of a medical  
31 expert to assist in properly assessing plaintiff's physical  
32 limitations," and to "procur[e] additional explanatory  
33 information from Dr. Sidhu regarding his opinion that claimant  
34 can only perform a sedentary job" is reversible error.



1           Plaintiff also asserts that the ALJ committed reversible  
 2 error by failing to comply with agency social security rulings.  
 3 I agree. Pursuant to Social Security Rulings 83-12 and 96-9p,  
 4 the ALJ failed to determine whether "the full range of sedentary  
 5 work is significantly eroded," or whether "the full range of  
 6 sedentary work is significantly compromised." The ALJ wholly  
 7 failed to address these issues. Social Security Ruling (SSR) 83-  
 8 12, relied on by the defendant, directs the ALJ to "decide  
 9 whether the full range of sedentary work is significantly  
 10 compromised. Similarly, SSR 96-9p requires the ALJ to address  
 11 "whether the full range of sedentary work is significantly  
 12 compromised," and "the extent of erosion of the unskilled  
 13 sedentary occupational base." The Ruling states, in part:

14           Moreover, since each occupation administratively  
 15 noticed by Table No. 1 represents numerous jobs,  
 16 the ability to do even a limited range of sedentary  
 17 work does not in itself establish disability in all  
 18 individuals, although a finding of "disabled" usually  
 19 applies when [as here] the full range of sedentary  
 20 work is significantly eroded[.]

21           . . .

22           In more complex cases, the adjudicator may use the  
 23 resources of a vocational specialist or vocational  
 24 expert. The vocational resource may be asked to  
 25 provide any or all of the following: An analysis of  
 26 the impact of the RFC upon the full range of sedentary  
 27 work, which the adjudicator may consider in determining  
 28 the extent of the erosion of the occupational base,  
 examples of occupations the individual may be able  
 to perform, and citations of the existence and number  
 of jobs in such occupations in the national economy.

SSR 96-9p.

          Here, the ALJ failed to decide "whether the full range of  
 sedentary work is significantly compromised," nor did the ALJ  
 request that the VE "assess the effect of any limitation on the

1 range of work at issue (e.g., the potential occupational base)."  
2 The record does not reflect that the ALJ or VE ever commented  
3 upon the occupational base or the range of work issue.

4 Moreover, in response to the ALJ's RFC limitations, out of  
5 the original 200 sedentary, unskilled occupations, the VE was  
6 able to identify only three occupations that plaintiff could  
7 perform. Relying on the criteria in SSRs 83-12 and 96-9p, a  
8 finding that plaintiff's "full range of sedentary work is  
9 significantly compromised" was warranted, and a finding of  
10 disability follows.

#### 11 CONCLUSION

12 The Commissioner's decision is not based on substantial  
13 evidence, and is therefore, reversed and remanded for payment of  
14 benefits.

15 IT IS SO ORDERED.

16 Dated this 31 day of January 2008.

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21 Ann Aiken  
22 United States District Judge  
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